IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 215

IN THE MATTER OF WILLIAM OLIVER,
Petitioner

BRIEF IN ANSWER TO BRIEF OF STATE BAR OF MICHIGAN

LOUIS M. HOPPING,
2256 Penobscot Building,
Detroit 26, Michigan;

OSMOND K. FRAENKEL,
120 Broadway,
New York 5, N. Y.;

ELMER H. GROEFSEMA,
2342 Buhl Building,
Detroit 26, Michigan;

WM. HENRY GALLAGHER,
3005 Barlum Tower,
Detroit 26, Michigan;
Attorneys for Petitioner.

Interstate Brief & Record Co., Case Bldg., 457 Port St. W., Detroit 26, Mich.

INDEX TO CASES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 215

IN THE MATTER OF WILLIAM OLIVER,
Petitioner

BRIEF IN ANSWER TO BRIEF OF STATE BAR OF MICHIGAN

FOREWORD

A brief has been filed allegedly upon behalf of the State Bar of Michigan as *amicus curiae*. It is signed by Wilber M. Brucker as chairman of the Special Committee of the Michigan State Bar on the One-Man Grand Jury System.

We have no objection to this court receiving aid from any source in a decision of the instant case. But we do challenge the right of anyone to file a brief in the name of the State Bar of Michigan and we challenge the right of Mr. Brucker to sign such brief in his capacity as chairman of the Special Committee.

We admit that at the January 9, 1948 meeting of the Board of the State Bar of Michigan, a motion was passed "that the President be authorized personally and under his direction with the help of such lawyers as he may designate to file a brief *amicus curiae* in the United States Supreme Court in the William Oliver case." It will be noted that this motion does not indicate on what proposition or upon which side of same such brief should be filed. The Commissioners of the State Bar have no right to commit the State Bar as such to support either side on the issues before this court, and the filing of a brief in its name has therefore met with the prompt and severe condemnation of a large number of the members of that body.

Our challenge to the signing of the brief by Mr. Brucker as Chairman of the Special Committee goes to the fact that this Committee has never met since its reappointment in September of 1947, and its members have not in any way authorized its chairman to sign a brief as such or to take any sides in the instant case.

The abuses of the contempt powers by inquisitors was brought to the attention of this special committee at its last meeting which was held in June, 1947. The committee felt unprepared to dispose of that subject. This was one of the reasons it asked that its life be extended. The committee has thus never put itself on record on such contempt procedure abuses. And Mr. Brucker has no right to represent to this court that it has done so by filing a brief as its chairman.

To render the arguments presented in the Brucker brief specious, resort is had to the ascribing of false statements to us and to the presentation of the most glaring misstatement of facts. Typical is the statement (p. 30),

that in Michigan contempt cases trial by jury is allowed. We know of not a single instance in Michigan history where a jury was allowed in a contempt case. And if there ever was such in some remote district, it was by grace of the judge, and not as a matter of right.

The attorneys for the petitioners feel that the controlling facts are so few and the applicable principles so clear, that these alone need be considered by this court, and that charges and countercharges on irrelevant facts may tend to confuse rather than to aid the court. Yet we may not permit misstatements to go unchallenged.

We have decided that in this case, contrary to the usual practice, we will, in this reply brief, first present our views upon the legal principles touched upon by the Brucker brief. The Court may stop with these, if it pleases. But that the Court may have a correct view of all the facts, we will follow with a discussion of the alleged facts and the observations based thereon which the Brucker brief presents.

DOES A JUDGE ACTING AS A ONE-MAN GRAND JUROR "HOLD COURT"?

The Michigan Supreme Court has not been so bold as to come out flatfootedly with the statement that a Circuit Judge, while acting as inquisitor under the statute, is holding court. It has said that he is acting "judicially." And in the Hartley case, (the companion case to the instant case and which the instant case follows), it does say that Hartley's contempt "was committed in the face of the court."

This language of the Michigan Court is made the basis of the argument by the Brucker Brief that in Oliver's case

there was in truth and fact an actual contempt of court as distinct from a contempt of the inquisitor. And it supports this argument by the statement that Oliver testified "on the witness stand in the court house." No record citation is given to support that statement and we have searched the record in vain for support for it.

But while the Brucker brief does not hesitate to go outside the record to make this assertion, it is noteworthy it does not venture to say that in truth and fact Oliver testified at a session of a court.

The record is that Oliver testified "in secret chambers." The return of the Circuit Judge does not challenge this statement. Even the Brucker brief does not challenge this statement. It merely alleges that the court room was used as the secret chambers. We are willing to admit that at times inquisitors use the court rooms as secret chambers. But even the staunchest supporters of the Michigan Judicial Inquisitorial System admit that these secret chambers at other times are in office buildings, hotel rooms, and even private dwellings. As one of them has observed:

> "In addition to his regular offices, Judge Ferguson maintained a secret suite on the 19th Floor of the National Bank Building, and at various times had as many as two other secret meeting places, or 'hideouts,' as they were dubbed by the newspapers."[1]

The matter thus resolves itself into the question, "Does a Judge take his Court with him wherever he goes, and does he constitute a Court wherever he may find himself, with the power inherent in a court to punish as for con-

[1] 28 Jl. Am. Jud. Soc. 142.

tempt a witness whose testimony he chooses to disbelieve?"

The Michigan Supreme Court first ascribed the term "Judicial" to an inquisitor's activities in a case which involved neither the constitutionality of the statute nor the inquisitor's power of contempt.[1] It then adopted the loose language of that decision as a basis for holding the inquisitorial statute constitutional[2] and later for justifying contempt of court judgments by inquisitors.[3]

Aside from the bald pronouncement of the Michigan Supreme Court, not a single authority is submitted to this court to justify the State's contention that an inquisitor is in truth a court. We do not deem it necessary to brief this proposition exhaustively, and will therefore content ourselves with citing a few authorities out of the abundance available.

Definitions of what constitute a court usually start with Blackstone who followed Coke in saying that a court is "a place where justice is judicially administered" (3 Bl. Comm. 23), and consists of three parts, "the actor or plaintiff, who complains of an injury done; the reus, or defendant, who is called upon to make satisfaction for it, and the judex, or judicial power, which is to examine the truth of the fact, to determine the law arising upon that fact, and if any injury appears to have been done, to ascertain, by its proper officers, and to apply the remedy" (3 Bl. Comm. 25).

The most complete definition of "court" probably is "An organized body with defined powers meeting at cer-

---

[1] *Mundy v. McDonald*, 216 Mich. 444.
[2] *People v. Doe*, 226 Mich. 5.
[3] *In re Slattery*, 310 Mich. 458.

tain times and places for the hearing and decision of causes and other matters brought before it, aided in this proper business by its proper officers, viz: attorneys and counsel to present and manage the business, clerks to record and attest its acts and decisions, and ministerial officers to execute its commands and secure due order in its proceedings. *Rudd v. Hazard*, 266 N. Y. 302; 194 N. E. 764; *Ex Parte Gardner*, 22 Nev. 280; 39 Pac. 570; *Fitz-Patrick v. Simonson Bros. Co.*, 86 Minn. 140; 90 N. W. 378; *State v. Baudoin*, 115 La. 773; 40 So. 42.

Michigan stands alone in deciding that a judge constitutes a court, even when he is exercising non-judicial functions in secret hide-outs. Whenever the question has arisen the Courts have been uniform in their decisions that a judge is not a court.

In re Election, 281 Pa. 281; 126 Atl. 568;
U. S. Life Insurance Co. v. Shattuck, 57 Ill. App. 382;
Ex parte Gardner, 22 Nev. 280; 39 Pac. 570;
People v. Board, 151 N. Y. 75, 45 N. E. 384, 387;
Hartshorn v. Ill. Valley Railroad Co., 216 Ill. 392; 75 N. E. 122, 126;
Eichoff v. Caldwell, 61 Okla. 217; 151 P. 860, 861.

"Courts or tribunals in the nature of courts are the only agencies of the law by which a cause can be heard and determined. They are the only depositaries of judicial power. Without them it lies dormant and inactive in the sovereignty of the State. Its active and potent existence is inseparable from that of a court. * * * To constitute a court the judge or judges must be in the discharge of judicial duties at the time and in the place prescribed by law for the sitting of the court."

Johnston v. Hunter, 50 W. Va. 52, 40 S. E. 448.

> "Certainty, both as to time and place, is essential to the conception of a court of justice; it would be eminently Caligulan could it act when and where it pleases the judge. Without recourse to the notion of a Court as a sort of incorporate entity, it is obvious that a judge does not at all times and places constitute a court, and that he cannot, when he pleases assert and enforce his judicial power. He becomes a judge when he is appointed or elected, but he becomes a court only when, at the time and place designated by law, he performs judicial duties."
>
> *Venhoff & Co. v. Morgan*, 11 Ky. Law Rep., 276, 278.

The Michigan Court is not without guidance in its own decisions as to what constitutes a court, even though it chooses to ignore them.

> "By courts, as the word is used in the Constitution, we understand permanent organizations for the administration of justice, and not those special tribunals provided for by law that are occasionally called into existence by particular exigencies, and that cease to exist with such exigencies."
>
> *Streeter v. Paton*, 7 Mich. 341, 347;
> *Shurbun v. Hooper*, 40 Mich. 503.

How aptly this applies to inquisitors, who are called into existence only by the special exigency of a complaint charging a crime being filed with them.

> "A court consists in its jurisdiction and functions and not in its title or name."
>
> *Kates v. Reading*, 254 Mich. 158.

On page 3 of our original Reply Brief we quoted this court's definition of "Court" in *Todd v. U. S.*, 158 U. S. 278, which is in full accord with the foregoing authorities.

In holding that an inquisitor acting in secret, even at a "hideout," carries with him judicial power and constitutes a "court," the Michigan Supreme Court is completely at variance with the fundamental concept of a court and with the holdings of all of the courts that have been called upon to construe the term "Court." And when it is recalled that the contempt powers which they seek to exercise are those which are reposed "in every court of record" (Sec. 13910 C. L. 1929), their violation of due process is indisputable.

IS THIS COURT BOUND BY THE HOLDING OF THE MICHIGAN COURT THAT INQUISITORS ACT IN A JUDICIAL CAPACITY?

We accept the familiar *general* rule that this court is bound by the construction placed upon a statute of a state by its highest court. But this rule does not apply here for two reasons: (a) The holding that inquisitors act in a judicial capacity does not involve a construction of state statute, and (b) The general rule does not apply where the principle of due process of law is involved.

(a)

The State Bar's brief assumes, without any attempt to demonstrate it, that the holding that an inquisitor acts "judicially" involves a construction of a state statute. Yet an examination of each of the cases in which that term was employed will disclose that the court did not have under consideration the construction of any phrase, clause, sentence or paragraph of the statute. In none of those cases was it considered that there was any uncertainty, indefiniteness, or ambiguity in the statute which required construction. On the contrary, when the court made use of

the phrase "judicial capacity" it was to describe not a term employed in the statute, but the character of the activity engaged in by inquisitors. In its ultimate use, and in that now under consideration, it was employed to characterize an inquisitor's session as a session of the court itself.

The pronouncement that an inquisitor's session constitutes holding court thus involves no statutory construction and is a mere misapplication of legal principles, and such pronouncement by the Michigan Court does not bind this court.[1]

(b)

It should be self-evident that if in fact an inquisitor's session is not the holding of a court, a state court could not defeat a citizen's right to due process merely by attaching the label "Court" to an inquisitors proceeding. The power to punish summarily for contempt under state statutes giving courts of record contempt powers cannot be conferred upon a temporary body or tribunal merely by calling such a body or tribunal a "Court."

And so this court has consistently held that it is not bound by state court's construction of its statutes, where due process of law is involved.

Grannis v. Ordean, 234 U. S. 385, 394; 58 L. Ed. 1363, 1368;
Murray v. Gibson, 15 How. 421; 14 L. Ed. 755;
Norton v. Shelby County, 118 U. S. 425; 30 L. Ed. 178;
Stutsam County v. Wallace, 142 U. S. 293; 35 L. Ed. 1018;
Sco't v. McNeal, 154 U. S. 34, 38 L. Ed. 896.

See also *Ashcraft v. Tennessee*, 322 U. S. 143, 88 L. ed. 1192.

---

[1] *Town of Venice v. Murdock*, 92 U. S. 494, 23 L. ed. 583.

DO MICHIGAN JUDGES WITHOUT RESTRAINT ENGAGE IN THE PRACTICE OF SUMMARILY CONVICTING CITIZENS OF CONTEMPT OF COURT EVEN THOUGH THEY HAVE NEVER BEEN BEFORE A COURT?

The above proposition was asserted by us as a reason for the allowance of the writ of certiorari. The State Bar's brief says flatly, "This charge is untrue," and "has no foundation in the record in the instant case nor in the record of any other Michigan case."

The instant case, and the companion Hartley case, are typical. Neither of these men ever was before a court. Both were imprisoned for contempt of court. Those are the bald facts. No pronouncement of a court that a grand juror acts in a "judicial" capacity can operate to transform his secret chambers into a court.

When we said that the judges act in this respect without restraint we had in mind the practical situation that results from the joining of the judicial powers and the executive powers in the one-man grand juror. By virtue of his office a Circuit Judge is the highest judicial officer in the county. Exercising his grand jury powers of appointing special prosecutors, marshaling witnesses and directing prosecutions, he becomes the highest prosecuting official in the county, and is "not under the control of either the prosecuting attorney or the state attorney general."[1]

When the elected prosecutor disregards a citizen's rights, the latter may at once appeal as of right directly to the circuit judge for relief. But when the grand juror or his aids violate such rights, there is no county judiciary officer to whom he can turn for relief. There is thus

---

[1] *In re Recount*, 270 Mich. 328, 321.

absent that normal restraint which State Constitutions under the American Governmental system were intended to provide.

It is the very fact that the judges know that there is no one above them in the county to whom a citizen can turn for relief which is at the root of most of the abuses of the one-man grand jury system.

Moreover, when a grand juror imprisons one for contempt, there is no right of appeal. A special application to the Supreme Court for leave to appeal is required. A transcript of the testimony is never available to the citizens as a basis of an application for leave to appeal. And there is thus scant opportunity for the ordinary person to move the discretion of the Supreme Court to grant him an appeal.

The instant case graphically illustrates this pernicious situation. The facts when returned to the court were not such as to impel a majority of the court to grant relief. It is obvious therefore that had Oliver filed an application for leave to appeal such application must have been denied. It was only the fortuitous circumstance that no order ever was entered for his imprisonment, thus entitling him to a writ of Habeas Corpus, which enabled him to get into the Michigan Supreme Court at all.[1]

* * * * *

In discussing the above proposition the State Bar brief states that the one-man grand juror "holds court * * *. grants orders of immunity, maintains and signs the daily

---

[1] Imprisonment without any order is not singular to this case. The same course was followed in *In re Slattery*, 310 Mich. 458. In each case the entry of an order followed the taking of steps by the prisoner for an appeal.

journal of the court, is expected to maintain the dignity of the court, and in every other way to conduct the functions of the Circuit Court."

Three false statements appear in that sentence.

(1) No man functioning as a grand juror can "hold court," for by statute the grand jury proceedings are required to be secret, with the injunction of secrecy imposed upon every person whom the juror may permit to be present. This hardly conforms to the requirement of an open court.

(2) The statute does not authorize the entering of orders granting immunity, nor do inquisitors follow the practice of entering orders of immunity. Herein lies one of the vices of the system. The statute does require that where one is compelled to answer incriminating questions, the questions and answers shall be entered upon the docket or journal of the judge, and as to such questions the witness shall thenceforth have immunity. In practice the judges fail to enter such questions upon the docket lest persons affected by such testimony will thus have notice. The witness then is without any protection. Should anything happen to the judge or to his recollection (and instances have occurred where as much as a year elapsed between the compelling of the answer and the entry of the questions on the docket) the witness is without protection.

Another vicious aspect follows. The prosecutor and the judge go through the ceremony which the statute ordains shall operate as a grant of immunity to a witness. The witness is given to understand he has immunity, not knowing that it is limited to the certain specific questions which are enumerated by the prosecutor. The witness then testifies freely under the assumption of immunity, only to be

met with a subsequent warrant for a crime not embraced within the specified questions.

(3) With two exceptions, an inquisitor's activities are not recorded in the daily journal of the Court. Indeed, not even his presence is noted there. The exceptions are

(a) A record of the incriminating questions, as to which a witness shall thenceforth by statute have immunity. These in practice are not entered in the daily journal until months later, a page being left blank in the journal for that purpose.

(b) Orders adjudging witness guilty of contempt of Court.

IS THE QUESTION OF THE DENIAL OF DUE PROCESS BY REASON OF A FAILURE TO RETURN THE FULL TRANSCRIPT OF THE WITNESS'S TESTIMONY BEFORE THIS COURT?

Neither in our brief nor in our argument before the court have we urged this court to reverse this conviction merely because the partial return of the witness's testimony to the Supreme Court constituted a denial of due process. The Brucker brief's claim that we have done so is in keeping with the tenor of the balance of the Brucker Brief. The questions we present are much more basic,—the denial of due process in the original commitment.

The facts that respondents in Michigan Courts not only have no hearing in the Circuit Court, but are denied a hearing on a full record in the appellate court naturally came out upon the presentation of the case to this court. It is a part of narrative of the facts. It was apparently shocking to this court that such an appellate practice could have developed. But to us it is much more shocking that an accused charged with contempt not committed in open

court be denied *any* trial in the lower court than that he be given a trial only upon an incomplete record in the appellate court.

The question of whether due process is violated by an incomplete return of the testimony upon which the witness was convicted will become of no importance when it is determined either that alleged false testimony before an inquisitor cannot be the basis of contempt of court, or, if it can be the basis, that it can be translated into contempt of court only by the filing of a charge in court and a hearing upon that charge. In the latter case the hearing will be a public one and there will be no question of suppressing any portion of the record on appeal.

The pernicious practice of denying a full record on appeal will of necessity vanish with the pernicious practice of an inquisitor jailing a citizen without a hearing.

The facts, however, are before this Court. Oliver demanded a full record. This demand was overruled. There was thus a clear violation of due process which this Court might well condemn.

The denial of an appeal upon a full record is but one of the vices which flows from the assumption of executive powers by the judiciary. It is characteristic of judges thus acting to lose sight of true values and to become so warped in perspective and so clouded in their faculties that their ordinarily sound sense of propriety and justice does not function. All trace of judicial temperament vanishes.

Witness the *regular practice* of detaining as prisoners witnesses who respond to subpoenae, the too common use of subpoena *duces tecum* as search warrants, the insistence on acting as examining magistrates to determine whether there was basis for their own warrants, the insistence on themselves determining all challenges to their actions

which may come in the form of motions to quash warrants, motions for return of property, etc. Witness Judge (now Senator) Ferguson denying McCarthy a transcript as a basis of appeal on the ground that by the statute "he was prohibited from doing so"!

And the Michigan Supreme Court seems to have become infected with the same infirmity, as evidenced by its decisions, hereinafter reviewed, in cases arising under the inquisitorial statute.

WHAT WAS THE BASIS OF PETITIONER'S CONVICTION?

The attorneys for the petitioner state frankly that they have no interest in petitioner's guilt of innocence. Their only concern is that the law of the land be observed before his guilt be adjudicated.

At the same time it is important that he not be prejudiced before this court by the Brucker brief's contention as to his guilt.

The Brucker brief advances a theory that the money Oliver paid was for protection and was disguised as a premium on bonds. In other words, that officials got this money and that they were foolish enough to create evidence of their dealings by issuing bonds and attaching stickers to the machines in question. But the fact is that the Inquisitor got no such impression from Oliver's testimony. To convict Oliver of falsity only adds to the circumstances of the disposal of the bonds. His return states:

"V.

"That the said William D. Oliver was subpoenaed as a witness before the said Grand Jury and *questioned as to the present status and location* of the said bonds."

VI.

"The the said William D. Oliver gave false and evasive answers *concerning the status of the whereabouts of the said bonds* as follows:

(a) That the said William D. Oliver testified that he had destroyed the said bonds.

(b) That the said William D. Oliver gave false and evasive answers as to the method employed by him in destroying said bonds.

(c) That the said William D. Oliver impeded the progress of the Grand Jury by refusing to give information which would enable the Grand Jury to discover said bonds.

* * * * *

IX.

"That the testimony given by the petitioner and which the grand jury has concluded is false and evasive, is as follows:

(Here follows testimony.)"

From this it is apparent that the sole basis of adjudication by the inquisitor was the alleged falsity of Oliver's testimony as to the disposal of the bonds. Yet half the Michigan Supreme Court finds him guilty of contempt upon a wholly different basis as well, and it is this additional basis, and not the basis on which he was actually convicted by the Circuit Judge, which the Brucker brief stresses.

REVIEW OF FACTS PRESENTED IN BRUCKER BRIEF

Our original brief presented the facts and the law in skeletonized form, with the barest statement of the facts and a concise presentation of the law. We followed this course because we sought a clean-cut issue, confident that a clear understanding was all that was required to enable the court to see the force of our arguments. We dare say that seldom is a brief filed upon a civil rights question which was so totally devoid of rhetoric.

Our reply brief followed the same course.

Yet the Brucker brief charges that we "have gone completely outside the record and have made a host of unsupported statements and indulged in unwarranted inferences derogatory to the one-man grand jury statute."

It then pictures the one-man grand jury system as a beneficent institution which it proceeds to defend. In doing so it is guilty of the very practice it lays at our door. And inevitably an exploration of the alleged facts which it cites in its attempt to justify the Michigan inquisitorial system leads to an exposition of the many vices of that system. This will clearly appear from the review which follows.

* * * * *

The Brucker brief refers to the fact that there exists a special fifteen-man committee to study the workings of the inquisitorial statute. The very fact that such a committee was appointed by the State Bar emphasizes the fact that the procedures of these inquisitors have challenged the attention of thinking persons. Mr. Brucker was the chairman of that committee. His brief is in some respects a re-hash of portions of the report of the majority of the committee. That report was written by him and, while circulated by mail among the members, was never considered at a meeting of the committee.

* * * * *

It is true that at its September convention the State Bar adopted the majority report by a three to two vote, and extended the life of the committee. But it is not true that the committee has since been engaged in study. Not one meeting of the committee has since been held, nor has any assignment of subjects for study been made to its members.

* * * * *

It is true that the inquisitorial statute is simple. But it is also true that this simple statute has been encrusted with procedures and powers which inquisitors have arrogated to themselves so that in its actual working a very complex system has developed.

The statute merely authorizes a judge to take the testimony of a witness if a complaint is filed charging that a crime has been committed and that a witness can give evidence as to it. It was early held by half the Michigan Court that the statute "does not authorize a grand inquest with the power of roving inquiry and presentment of offenders generally."[1] But half the court ruled otherwise. And by this division of the court an inferior judge's ruling upon this vital question became the law for the State.

* * * * *

The State's brief takes occasion to point out that Justice Frank Murphy of this Court acted under this statute. But he acted in conjunction with the officers who by law were charged with the prosecution of crime in his court,—the prosecuting attorney and the corporation counsel. It is a far cry from his day to the present, when the inquisitors choose their own special prosecutors, establish their headquarters in some non-public building, organize a staff of detectives, accountants and investigators, and forsake their judicial duty literally for years at a time. The

[1] *People v. St. John*, 284 Mich. 24.

Brucker brief professes ignorance of this, even denies it is true, but it is a matter of public knowledge, not merely from newspaper reports, but from the fact of participation of such agents in the trials of cases. Let us quote a *friend* of the system:

> "For more than two years Judge Ferguson, assisted by a special prosecutor and staff, devoted his full time to the investigation." (*28 Jl. Am. Jud. Soc.* 142.)

The same author states, with reference to the Carr grand jury, which ran for three years,

> "A special prosecutor heads a staff of some fifteen investigators." (Idem, p. 137.)

And the Michigan Supreme Court has held that, in so acting as a prosecutor, an inquisitor is supreme and is subject to the control neither of the county prosecuting attorney or the state attorney general.[1]

* * * * *

As to whether this uniting of the highest judicial powers and the highest executive powers in one person results in abuses, the readiest authority is the author of what is denominated the State Bar Brief himself. He was also the author of the majority report of the special committee of the State Bar on the inquisitorial system. The report which he drafted recognized and urged the remedying of the following abuses:

(1) The practice by inquisitors, after having ordered a warrant, of insisting upon acting as the examining magistrate to determine whether the accuser was justified in his accusation. This was held by the Michigan Court not to

---

[1] *In re Recount*, 270 Mich. 328, 321.

offend the requirements of due process.[1] But the practice was unanimously condemned by the State Bar in convention in 1946, as a result of which condemnation the law, by a draft framed by the Special Committee, was amended to preclude the accuser from presiding over a hearing on his accusation.

(2) The unwarranted assumption of the inquisitor's role by judges.

(3) The use of a witness subpoena as a warrant of arrest and the ensuing unlawful detention of the citizen. (This is a regular practice.)

(4) The use of a subpoena *duces tecum* as a search warrant.

(5) The unnecessary issuance of forthwith subpoenas which are served in the middle of the night when the grand jury is not even in session.

(6) The abuse of the immunity provisions of the statute resulting in witnesses testifying under an assumed complete grant of immunity when this grant is limited only.

(7) The issuance of statements by grand jurors designed to prejudice defendants and for personal or political purposes in disregard of Canons of Ethics.

And it must not be forgotten that the committee has not completed its work and has asked that its life be extended for further study.

To the foregoing list we would add the following which have come to the personal attention of one or another of counsel for the petitioner:

---

[1] *People v. McCrea*, 303 Mich. 213, 248.

(1) The failure to advise witnesses of their constitutional rights. In the early days such advice was given scrupulously; now it is carefully avoided.

(2) Summoning a wife and questioning her about the activities of her husband.

(3) Refusing the witness the right to consult with his lawyer before answering.

(4) Warning a witness that because of the statutory injunction of secrecy he must not consult with his lawyer between periods of questioning.

(5) The abuse of the contempt powers, as exemplified by the instant case.

(6) The denial of a full hearing on appeal, as exemplified by the instant case.

* * * * *

The device of presenting the names of the individuals who through the years have been members of a court as an argument for sustaining a decision of that court is a novel one. It has never before been resorted to in the combined experience of the counsel for the petitioner. It is unfortunate that the State Bar was driven to the extremity of resorting to such an argument. It is embarrassing to us to be called upon to answer it. Yet we cannot run away from the challenge. The following facts, taken from the decisions of that court on matters involving the inquisitorial statute, afford a complete answer:

I.

When the question of whether an inquisitor acted judicially first came before the court[1] that important question was disposed of with the following terse pronouncement:

[1] *Mundy v. McDonald*, 216 Mich. 444.

> "That defendant acted in a judicial capacity cannot, we think, be questioned. What he did he did as a Circuit Judge."

Note that neither logic nor authority is presented to justify the decision.

II.

When the constitutionality of the statute first came before the court,[1] it was sustained by an opinion of half the court with the following bald announcement:

> "This objection is answered by the case of *Mundy v. McDonald*, 216 Mich. 444, where we said:
>
> 'That defendant acted in a judicial capacity cannot, we think, be questioned. What he did he did as a circuit judge.'"

Again no logic, again not a single citation on Constitutional Law.

This pronouncement of *half* of the court was thereafter accepted as the law in Michigan.

III.

The constitutionality of the statute was again presented in *In re Slattery*, 310 Mich. 459. There the court gave earnest consideration to the objection that the statute imposed non-judicial duties on a judge in violation of the Constitution. It decided that important constitutional question, however, without citing in its support a single case on Constitutional Law. And it chose to ignore a second objection to the constitutionality of the act,—that if the inquisitor acts in a judicial capacity, then the statute is void as conferring judicial powers on a *judge* instead of upon *courts only*, as the Constitution ordains.

---

[1] *People v. Doe*, 226 Mich. 5.

IV.

The constiutionality of the statute was again challenged in *Kloka v. Brake*, 318 Mich. 87, and this second objection to the constitutionality of the Act was again briefed and argued and again ignored by the court in its opinion.

V.

The question that is now before this court was presented to the Michigan Supreme Court in *In re Slattery*, 310 Mich. 459, in almost the exact form and with the same authorities heretofore presented to this court. And the Michigan Supreme Court totally ignored the proposition.

VI.

In *In re McCarthy*, 294 Mich. 368, McCarthy, a police officer, was sentenced to five days imprisonment for "Contempt of Court" on Thursday, August 29, 1939. His sentence terminated with Labor Day. It was physically impossible to comply with Michigan court rules and obtain leave to appeal to the Supreme Court within the five day period of his imprisonment, even had no week-end and holiday been a part of his period of imprisonment. He was then suspended from the police force. The inquisitor, Judge (now Senator) Ferguson denied him a transcript of his testimony as a basis of an application for leave to appeal on the ground it was secret and he had no right to disclose it. The Michigan Supreme Court sustained this denial upon the ground that the question was moot, despite the fact that the conviction had cost McCarthy suspension from his employment, and the loss of the benefit of years of service.

VII.

In *In re Slattery*, 310 Mich. 459, the Circuit Judge also refused to furnish the witness' testimony as a basis of

an application for leave to appeal. Slattery then applied to the Michigan Supreme Court for Habeas Corpus and Certiorari. Certiorari was granted explicitly limiting the judge's return to the proceedings in *court*, so as *not* to bring before the Supreme Court Slattery's testimony before the inquisitor. The inquisitor accordingly made a formal return of his order of commitment and nothing more.

On his own motion, however, the Circuit Judge later made a further return in which he set forth portions of Slattery's testimony and indicated omissions therefrom by asterisks. He then added "that from substantial evidence previously submitted to the Grand Jury," (Slattery record, p. 17)[1] there was reason to believe that Slattery had talked with a certain legislator and "that Slattery recalled the incident."

In other words, Slattery had been convicted by the inquisitor upon the testimony of a witness with whom he was not confronted!

Slattery's counsel asked that the complete record be returned to the Supreme Court stating (Slattery record, page 25):

> "And while we feel that this transcript should be available to us for the purpose of argument, we are willing, if this court does not agree with us, that the transcript be returned to the court for its inspection in confidence and, if necessary, even without submitting it to us."

This proposition was disposed of by the statement:

> "Petitioner was not entitled to a full inspection of the examination by the Grand Jury"

[1] The record in the Slattery case is on file in this court

with the citation of two cases which hold that defendants on trial for crimes were not entitled to access to grand jury testimony.

VIII.

Again in the instant case there was a denial of a hearing on appeal on the full record upon which the conviction was based.

IX.

Finally, we point out that the Michigan Supreme Court has perversely held to its pronouncement that an inquisitor acts in a judicial capacity without a single authority in support of its position and in the face of the contrary authorities heretofore submitted to this court, these having been presented to the court in the Slattery and Kloka cases, *supra*.

* * * * * 7

Such is a partial review of the record of the Michigan Supreme Court in dealing with questions arising under the inquisitorial statute. Upon that record the court must be judged. Neither can words of severe condemnation, on the one hand, accentuate, or of subservient adulation on the other, minimize, the force of that record. Some might say that that record reflects a careless indifference to the right adjudication of fundamental issues. To us, however, it reflects the fact that the court has an impossible task in trying fully to study and properly to adjudicate the innumerable issues that are presented to it. For the Michigan Supreme Court is the only appellate court in that state and it has for years been obvious that its judges are overworked.

CONCLUSION

The attorneys for the petitioner are not opposed to a one-man inquisitorial system. We recognize that a one-man grand jury does have certain advantages over a twenty-three-man grand jury. What we object to is the drafting of a member of the judiciary to take charge of one of the most important responsibilities of the Executive Department of the Government with the consequent lack of restraint by the judiciary upon such activities of the Executive Department.

We believe with Montesquieu that "There can be no liberty * * * if the power of judging be not separated from the legislative and executive powers," and that "Were the power of judging * * * joined to the executive power the judge might behave with all the violence of an oppressor."[1]

We believe that the workings of the Michigan Inquisitorial System, as now formulated, has furnished repeated examples of the accuracy of that observation.

The peculiar advantage in procedure which the Michigan Inquisitorial Statute introduced, is the power of the Inquisitor to grant immunity. No such power was theretofore reposed in any official in the State. Therefore, until the adoption of the Statute, if a witness stood upon his constitutional rights, the inquiry was ended. Now it may not be thwarted by a witness taking such a position.

There is no reason why the same power cannot be reposed in the County Prosecutor and in the State Attorney General, or at least that the authority be given to them to request an order of immunity from a judge. Armed

[1] Quoted in *Searle v. Yensen*, 118 Neb. 835, 226 N. W. 464, 69 A. L. R. 257.

with this advantage we believe the prosecutor could operate as a one-man grand juror just as effectively as could any circuit judge who was willing to confine his activities within legal bounds.

But if we are in error in this, and if it is a question of some guilty persons escaping prosecution or of the continuance of the flagrant violations of rights that have occurred in the past, then we are in favor of the accused going free, rather than of our judges continuing to be guilty of betrayals of their oaths of office.

In the instant case the Answer to the Writ of Habeas Corpus filed by the Circuit Judge is specific as to the basis of the judgment of contempt. It states that "Oliver gave false and evasive answers concerning the status of the whereabouts of the said bonds" * * * and "that the said William D. Oliver impeded the progress of the grand jury by refusing to give information which would enable the grand jury to discover said bonds" (91).

This clear statement leaves no room for conjecture as to the basis of Oliver's conviction. Therefore the gratuitous arguments of the Brucker brief that Oliver was guilty of false testimony other than that which was the basis of his conviction, scarcely comports with the responsibility of fairness and impartiality which a brief *amicus curiae* assumes. Upon the other hand, the hollowness of the circuit judge's charge that "Oliver impeded the progress of the grand jury by refusing to give information which would enable the grand jury to discover the said bonds," and this is the only impeding of the administration of justice laid to Oliver, is exposed by the fact that it is unchallenged that Oliver, during his testimony, identified a copy of the bond which he had purchased.

The instant case is thus exposed as one of those cases where the grand juror "assumed that the power existed to

hold a witness in confinement under the punishment until he consented to give a character of testimony which, in the opinion of the court, would not be perjured," and is a glaring example "of the dangerous effect on the liberty of the citizen when called upon as a witness in a court which might result if the erroneous doctrine upon which the order under review was based, were not promptly corrected." *In re Hudgings*, 249 U. S. 378, 63 L. Ed. 656.

The situation which has prevailed in Michigan for more then twenty years which permits the head of a secret tribunal to clap a citizen into jail whenever he does not like his testimony and deny the citizen a trial on the charge laid against him, suggests a forgetfulness of those pernicious practices, the necessity of abolishing which has given rise to the enunciation of many of our basic principles of civil rights. Those who have thus become forgetful may read with profit the historical review presented in *Brown v. Walker*, 161 U. S. 591, 16 Sup. Ct. 644, 40 L. Ed. 819, 821:

> "The maxim *Nemo tenetur seipsum accusare* had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons, which has long obtained in the continental system, and, until the expulsion of the Stuarts from the British throne, in 1688, and the erection of additional barriers for the protection of the people against the exercise of arbitrary power, was not uncommon even in England. While the admissions of confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence, if an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the questions put to him may assume an *inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner*, and to entrap him into fatal

contradictions, which is so painfully evident in many of the earlier state trials, notably in those of Sir Nicholas Throckmorton, and Udal, the Puritan minister, made the system so odious as to give rise to a demand for its total abolition. The change in the English criminal procedure in that particular seems to be founded upon no statute and no judicial opinion, but upon a general and silent acquiescence of the courts in a popular demand. But, however adopted, it has become firmly embedded in English, as well as in American jurisprudence. So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the states, with one accord, made a denial of the right to question an accused person a part of their fundamental law so that a maxim which in England was a mere rule of evidence became clothed in this country with the impregnability of a constitutional enactment." (Italics ours.)

Respectfully submitted,

LOUIS M. HOPPING,
OSMOND F. FRAENKEL,
ELMER H. GROEFSEMA,
WM. HENRY GALLAGHER,
Attorneys for Petitioner.